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No.

In the Supreme Court of the United States

Term, 1995

ERMA GARNER, Individually and as Administratrix of the Estate of Melissa Wileman, Deceased,

Petitioner

vs.

CAPITAL BLUE CROSS AND PENNSYLVANIA BLUE SHIELD,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

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(1) Because there is a conflict in the circuits as to whether a decedent, her Estate or her survivors' claims are preempted by ERISA, should Your Honorable Court decide this matter?

(2) Where a young woman died because her employer-provided health insurance refused to pay for lifesaving treatment, does ERISA, federal common law, or the Pennsylvania Bad Faith Insurance Statute provide her with a vehicle of redress?

(3) Where the Third Circuit followed neither its own precedent nor the Federal Rules of Civil Procedure in denying leave to amend, resulting in dismissal of this case, should the Petitioner have been permitted to amend her Complaint?

TABLE OF CONTENTS

	PAGE
Statement of Questions Presented for Review . . .	i
Table of Contents	ii
Table of Authorities	iv
Parties to the Proceedings	1
Reference to Opinions Delivered in the Courts Below	2
Statement of Jurisdiction	3
Relevant Statutory Provisions	4
Concise Statement of the Case	5
Argument:	
A. Because There Is A Conflict In The Circuits As To Whether A Decedent, Her Estate Or Her Survivors' Claims Are Preempted By ERISA, Your Honorable Court Should Decide This Matter .	7
B. Where A Young Woman Died Because Her Employer-Provided Health Insurance Refused To Pay For Lifesaving Treatment, ERISA, Federal Common Law, Or The Pennsylvania Bad Faith Insurance Statute Should Provide Her With A Vehicle Of Redress	9
C. Where The Third Circuit Followed Neither Its Own Precedent Or The Federal Rules Of Civil Procedure In Denying Leave To Amend, Resulting In Dismissal Of This Case, The Petitioner Should Have Been Permitted To Amend The Complaint	17
Conclusion	19

APPENDIX:

Judgment Order, Dated March 15, 1995 in the United States Court of Appeals for the Third Circuit, No. 94-7473, Roth, Circuit Judge, reported at 52 F.3d 314 (3rd Cir. 1995) 1a

Sur Petition for Rehearing In Banc, dated May 8, 1995 in the United States Court of Appeals for the Third Circuit, No. 94-7473, Sloviter, Circuit Judge 3a

Memorandum in the United States District Court for the Middle District of Pennsylvania, Civil Action No. 1:CV-94-0218, William W. Caldwell, District Judge, reported at 859 F. Supp. 145 (M.D. Pa. 1994) 7a

Order and Judgment, dated July 13, 1994 in the United States District Court for the Middle District of Pennsylvania, Civil Action No. 1:CV-94-0218, William W. Caldwell, United States District Judge 16a

Retirement Income Security, Chapter 18:

§1001(b)—Protection of Interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries 17a

§1001b—Additional Congressional findings and declaration of policy; single-employer plan termination insurance system 17a

§1104—Fiduciary duties 18a

§1109—Liability for breach of fiduciary duty . 19a

§1132—Civil enforcement 19a

§1140—Interference with protected rights . . 25a

§1144—Other laws 26a

Rule of Civil Procedure 8:

General Rules of Pleading 27a

TABLE OF AUTHORITIES

CASES:

Adams v. Gould, Inc., 739 F.2d 858 (3d Cir. 1984), cert. denied, 469 U.S. 1122, 105 S.Ct. 806 (1985) 18

Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292 (3d Cir. 1993) 10, 11, 12, 13

Corcoran v. United Healthcare, Inc., 965 F.2d 1321 (5th Cir. 1992), cert. denied, U.S. , 113 S.Ct. 812 (1992) 7

Curcio v. John Hancock Mut. Life Ins. Co., 33 F.2d 226 (3d Cir. 1994) 11, 13

District of Columbia v. Greater Wash. Bd. of Trade, 503 U.S. 970, 112 S.Ct. 1584 (1992) 7

FMC Corp. v. Holliday, 498 U.S. 52, 111 S.Ct. 403 (1990) 7

Holder v. City of Allentown, 987 F.2d 188 (3d Cir. 1993) 18

Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208 (3d Cir. 1984) 18

Kuhl v. Lincoln Natl. Health Plan of Kansas City, Inc., 999 F.2d 298 (8th Cir. 1993), cert. denied, U.S. , 114 S.Ct. 694 (1994) 7

Lafoy v. HMO Colorado, 988 F.2d 97 (10th Cir. 1993) 7

Liberty Corp. v. NCNB Nat. Bank of South Carolina, 984 F.2d 1383 (4th Cir. 1993) 8

Lorenz v. CSX Corp., 1 F.3d 1406 (3d Cir. 1993) . 18

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085 (1985) 11, 13, 14

McInnis v. Provident Life & Acc. Ins. Co., 21 F.3d 586 (4th Cir. 1994) 8

Mertens v. Hewitt Associates, 113 S.Ct. 2063 (1993) 15

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 105 S.Ct. 2380 (1985) 16, 17

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549 (1987) 10

Powell v. Chesapeake and Potomac Tel. Co. of Virginia, 780 F.2d 419 (4th Cir. 1985), cert. denied, 476 U.S. 1170, 106 S.Ct. 2892 (1986) . 8

Provident Life & Acc. Ins. Co. v. Waller, 906 F.2d 985 (4th Cir. 1990), cert. denied, 498 U.S. 982, 111 S.Ct. 512 (1990) 14, 15

Settles v. Golden Rule Ins. Co., 927 F.2d 505 (10th Cir. 1991) 7

Shaw v. Delta Airlines, 463 U.S. 85, 103 S.Ct. 2890 (1983) 7, 10

Spain v. Aetna Life Ins. Co., 11 F.3d 129 (9th Cir. 1993), cert. denied, U.S. , 114 S.Ct. 1612 (1994) 7

Stuart Circle Hosp. Corp. v. Aetna Health Management, 995 F.2d 500 (4th Cir. 1993), cert. denied, U.S. , 114 S.Ct. 579 (1993) 16, 17

Tolton v. American Biodyne, Inc., 48 F.3d 937 (6th Cir. 1995) 7

Warren v. Society Nat. Bank, 905 F.2d 975 (6th Cir. 1990), cert. denied, 500 U.S. 952, 111 S.Ct. 2256 (1991) 13, 14

RULES:

Fed. R.C.P.:

8 4

8(a)(2) 18

12(b)(6) 14

15(a) 18

56 17

STATUTES:

28 U.S.C. §1254(1) 3

Employee Retirement Income Security Act of 1974 (ERISA) as amended, 29 U.S.C.:

§1001 et seq. 4

§1001(b) 9

§1104(a) 11

§1104(a)(1) 13

§1109(a) 11

§1132 12

§1132(a)(1)(B) 13

§1132(a)(2) 11

§1132(a)(3) 12

§1132 (a)(3)(B) 10, 13

§1140 13

§1144(a) 7

§1144(b)(2)(A) 15, 16

McCarran-Ferguson Act, 15 U.S.C. §1011 et seq. . 17

Pennsylvania Insurance Bad Faith Statute, 42 Pa.C.S. §8371 16

OTHER AUTHORITY:

H.R. Rep. No. 101-247, 101 St. Cong., 1st Sess. 55-56, *reprinted in* 1989 U.S.C.C.A.N. 1906, 1947-48 10

PARTIES TO THE PROCEEDINGS

The only parties to the proceedings are those appearing in the caption of the case.

REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

On May 8, 1995, the United States Court of Appeals for the Third Circuit denied Erma Garner's Petition for Rehearing en Banc from its Judgment Order filed March 15, 1995. The March 15, 1995 Order affirmed the Order and Judgment of the United States District Court for the Middle District of Pennsylvania filed July 13, 1994, granting summary judgment in favor of the Defendants. The Third Circuit Decision is reported at 52 F.3d 314 (3rd Cir. 1995).

The District Court's Memorandum, Order and Judgment dated July 13, 1994, is reported at 859 F. Supp. 145 (M.D. Pa. 1994). The prior Decisions are reproduced in the Appendix, attached to this Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Petitioner seeks review of the Third Circuit Court of Appeals Judgment Order entered March 15, 1995, and denial of her Petition for Rehearing entered Ma[illegible] 8, 1995, affirming the Decision of the United States District Court for the Middle District of Pennsylvania dated July 13, 1994, docketed to No. 1:CV-94-0218. The Petition for Writ of Certiorari was filed within ninety days of denial of the Petition for Rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

This case was held by the lower Courts to arise under the Employee Retirement Income Security Act of 1974 (ERISA) as amended, 29 U.S.C. §1001 *et seq.* Also implicated is Fed. R.Civ.P. 8.

CONCISE STATEMENT OF THE CASE

When Melissa Wileman was twenty years old, in June, 1992, she was diagnosed with inoperable liver cancer. Melissa worked in a sewing factory in rural Pennsylvania. Indeed, she and her mother, Erma Garner, both worked there. As part of the women's compensation, their employer purchased Blue Cross/Blue Shield health insurance. Blue Cross and Blue Shield paid Ms. Wileman's medical bills until January, 1993, when her doctors recommended an autologous bone marrow transplant and high dose chemotherapy. Blue Cross denied preauthorization, and Pittsburgh Cancer Institute refused to perform the procedure without a guarantee of payment.

After writing to their state congressman and Governor for help to no avail, Melissa and her mother went to an attorney. After the lawyer wrote *one letter,* Blue Cross agreed to pay for the expensive procedure. However, Missy had waited nearly six months to go to a lawyer. She was no longer a candidate for the treatment, and after three months of agony, she died on September 15, 1993.

Suit was brought for injunctive relief against Blue Cross and Blue Shield in July, 1993, along with another health insurer when it was learned that her employer switched health insurers on June 1, 1993, so no company claimed responsibility for her. Depositions of Missy's oncologist, her employer, her mother and of the young woman herself were taken in July and August, 1993. Although Melissa Wileman requested that her case be heard immediately, it was not. On September 15, 1993, Melissa Wileman, age twenty-one, died, never having had the opportunity of the bone marrow transplant that her doctors believed might have cured her.

Concise Statement of the Case

On January 21, 1994, suit was begun against Blue Cross and Blue Shield in state Court and subsequently removed to Federal Court on Defendants' Motion. After a Motion to Dismiss was denied, the Defendants filed a Motion for Summary Judgment. The Federal District Court for the Middle District of Pennsylvania, holding all of Plaintiff's claims preempted by the ERISA Statute, ruled that the Pennsylvania Bad Faith Insurance Statute was preempted, and dismissed the case.

The Third Circuit by Judgment Order dated March 16, 1995, affirmed the Trial Court's ruling, adding that Petitioner was not permitted to amend her Complaint because she waited "too long." Petition for Rehearing was denied on May 8, 1995.

ARGUMENT

A. Because There Is A Conflict In The Circuits As To Whether A Decedent, Her Estate Or Her Survivors' Claims Are Preempted By ERISA, Your Honorable Court Should Decide This Matter

The Fourth Circuit has held that in death cases, the Estate's survival action is preempted by ERISA, while the wrongful death action is not. The other circuits that have examined similar issues have held both wrongful death and survival actions to be preempted.[1] Only Your Honorable Court can resolve this conflict and assure that all claims are resolved evenhandedly.

ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" within its scope. 29 U.S.C. §1144(a). That phrase has been broadly interpreted. *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403 (1990). However, it is not absolute. As Your Honorable Court has recognized:

> "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."

Shaw v. Delta Airlines, 463 U.S. 85, 103 S.Ct. 2890 (1983). *See also, District of Columbia v. Greater Wash. Bd. of Trade*, 503

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[1] *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992), *cert. denied*, U.S. , 113 S.Ct. 812 (1992); *Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir. 1995); *Kuhl v. Lincoln Natl. Health Plan of Kansas City, Inc.*, 999 F.2d 298 (8th Cir. 1993), *cert. denied*, U.S. , 114 S.Ct. 694 (1994); *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129 (9th Cir. 1993), *cert. denied*, U.S. , 114 S.Ct. 1612 (1994); *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505 (10th Cir. 1991); *Lafoy v. HMO Colorado*, 988 F.2d 97 (10th Cir. 1993).

U.S. 970, 112 S.Ct. 1584 (1992); *Powell v. Chesapeake and Potomac Tel. Co. of Virginia*, 780 F.2d 419, 421 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170, 106 S.Ct. 2892 (1986).

In *Liberty Corp. v. NCNB Nat. Bank of South Carolina*, 984 F.2d 1383 (4th Cir. 1993), the Court of Appeals held that the applicable state Wrongful Death Act "if it affects the Plan at all, does so in 'too tenuous, remote, or peripheral a manner' to warrant preemption." *Id.* at 1388. The Court examined the Wrongful Death and Survival Acts, holding that the former belongs to the decedent's beneficiaries, while the latter claim is of the decedent himself. Since the beneficiaries' claims under the Wrongful Death Act never belonged to the decedent, the Fourth Circuit held that state law action was not preempted by ERISA.

The Fourth Circuit case of *McInnis v. Provident Life & Acc. Ins. Co.*, 21 F.3d 586 (4th Cir. 1994) expands upon the view enunciated the year before. In *McInnis*, the Court emphasizes the differences between Wrongful Death Act and Survival Act claims:

> "The distinction between survival statutes and wrongful death statutes turns on the difference between those claims based on damages *preceding death* which were inflicted on and belonged to the decedent, and those claims based on damages *caused by* the decedent's death which belonged to family members."

Id. at 21 F.3d at 589. (Emphasis added.)

While Petitioner believes that claims of both the decedent and beneficiaries should be allowed to proceed, if Your Honorable Court adopts the reasoning of the Fourth Circuit, at least the Wrongful Death Act should be reinstated.

B. Where A Young Woman Died Because Her Employer-Provided Health Insurance Refused To Pay For Lifesaving Treatment, ERISA, Federal Common Law, Or The Pennsylvania Bad Faith Insurance Statute Should Provide Her With A Vehicle Of Redress

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The legislative intent of the ERISA Statute is explicitly enunciated:

> "... to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access in the Federal courts."

29 U.S.C. §1001(b).

Moreover, when the ERISA Statute was amended in 1989, the need for Federal Courts to be actively involved in fulfilling its purpose was acknowledged:

> "The Committee reaffirms the authority of the Federal courts to shape legal and equitable remedies to fit the facts and circumstances of the case before them, even though those remedies may not be specifically mentioned in ERISA itself. In cases in which, for instance, facts and circumstances show that the processing of legitimate benefit claims has been unreasonably delayed or totally disregarded by an insurer, an employer, a plan administrator, or a plan, the Committee intends the Federal Courts to develop a Federal common law of remedies, drawing upon principles enunciated in state law, includ-

> ing such remedies as the awarding of punitive and/or compensatory damages against the person responsible for the failure to pay claims in a timely manner."

H.R. Rep. No. 101-247, 101 St. Cong., 1st Sess. 55-56, *reprinted in* 1989 U.S.C.C.A.N. 1906, 1947-48.

Your Honorable Court recognized nearly a decade ago that when Congress enacted ERISA, it anticipated "that a Federal common law of rights and obligations under ERISA-regulated plans would develop." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549 (1987). No Court has yet fashioned Federal common-law rights and remedies to address the often-repeated scenario of an insurer denying lifesaving benefits and defending in the post-mortem action on the basis of ERISA preemption. To believe that such a result is intended under a statute designed to promote the interests of employees flies in the face of common sense, as well as prior Decisions of Your Honorable Court. *Shaw v. Delta Air Lines, supra.*

The Third Circuit in the case of *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993) held that a plan participant or beneficiary has a direct action for breach of fiduciary duty and is entitled to "other appropriate equitable relief" under the "Civil Enforcement" provisions of ERISA, 29 U.S.C. §1132(a)(3)(B). The Third Circuit noted:

> "Today we adopt the approach of Justice Brennan's concurrence in Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed. 2d 96 (1985), and hold that 'Section 502(a)(3) authorizes the award of "appropriate equitable relief" directly to a participant or beneficiary to "redress" *"any* act or practice which violates *any* provision of this title" ' including a breach of the statutorily created fiduciary duty of an administrator. 473 U.S. at 153, 105 S.Ct. at 3096."

Id. at 1298. (Emphasis in original.)

In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085 (1985), the Supreme Court addressed only the question of whether an ERISA fiduciary could be held personally liable to a participant or beneficiary for extracontractual damages caused by the improper or untimely processing of benefit claims under §409(a), 29 U.S.C. §1109(a), and §502(a)(2), 29 U.S.C. §1132(a)(2). With regard to those limited sections, the United States Supreme Court held that Congress did not intend to authorize remedies for breach of fiduciary duty except for the plan. *Id.* at 144.

In his concurrence, joined by three other Justices, Justice Brennan wrote separately to emphasize the limited reach of the majority opinion and to outline the proper approach for Courts to take in construing other ERISA provisions. It is precisely this analysis that the Third Circuit has adopted as persuasive. *Bixler v. Central Pa., supra; Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226 (3d Cir. 1994).

In his concurring Opinion in *Massachusetts Mutual, supra* Justice Brennan notes the sweeping fiduciary duties articulated in the ERISA Statute. Section 404(a), 29 U.S.C. §1104(a), sets forth the governing standard for a fiduciary, requiring him to discharge his duties solely in the interests of the participants and beneficiaries and for the exclusive purpose of "providing benefits to participants and their beneficiaries." That section also provides that in carrying out his duties, a fiduciary shall exercise "the care, skill, prudence and diligence" of a "prudent man acting in a like capacity." As Justice Brennan pointed out, the legislative history demonstrates that Congress intended §404(a) to incorporate the fiduciary standards of trust law into ERISA. Surely, it is black letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits. Just as clearly, trust law remedies are equitable in nature, and they include provision for monetary damages. *Id.* at 153 fn.10.

Justice Brennan points out that §502(a)(3) of the Civil Enforcement section of the ERISA Statute, 29 U.S.C. §1132(a)(3), authorizes the award of "appropriate equitable relief" directly to a participant or beneficiary to "redress" "*any* act or practice which violates *any* provision of this title" or the terms of the plan. (Emphasis in original.) Justice Brennan concludes:

> "A beneficiary therefore may obtain 'appropriate equitable relief' whenever an administrator breaches the fiduciary duties set forth in §404(a). Accordingly, an administrator's claims-processing duties and a beneficiary's responding remedies are not at all necessarily limited to the terms of §§502(a)(1)(B) and 503. In light of the Court's narrow holding, see ante, at 3089, n.5, further consideration of these important issues remains open for another day when the disposition of a controversy might really turn on them."

Id. at 153 (footnotes omitted).

In the Third Circuit's adoption of this legal interpretation, the Court of Appeals notes as did Justice Brennan that §404(a) is basic to understanding the scope of an ERISA fiduciary's duties. The principles embodied in §404(a) are given effect by §502(a)(3). As the Third Circuit noted:

> "Allowing an injured beneficiary recourse through the courts is, furthermore, essential to fulfilling the purpose of ERISA."

Bixler, supra at 1299. *See also,* Decisions of other circuits to the same effect, at 1299 fn.17.

The Civil Enforcement provisions of the ERISA Statute, §502, 29 U.S.C. §1132, encompass a plethora of remedies available under ERISA. A participant or beneficiary is entitled "to recover benefits due to him under the terms of his plan, to

enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B). These remedies stem from the fiduciary duties established within ERISA, §404(a)(1), 29 U.S.C. §1104(a)(1).

Assuming that the Defendants delay long enough, the claimant, like Melissa Wileman, will die. However, 29 U.S.C. §1132(a)(3)(B) in conjunction with the legislative history and intent of the statute authorizes the Courts to fashion fair remedies, including monetary damages. *Massachusetts Mutual, supra* at 153 fn.10. *See also, Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, supra* and *Curcio v. John Hancock Mutual Life Insurance Company*, Nos. 93-7545, 93-7556 (3d Cir. 1994).

Moreover, §510 of the ERISA Statute, 29 U.S.C. §1140 provides for additional liability against the Defendants:

> "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. ... The provisions of section 502 shall be applicable to the enforcement of this section."

Section 510, 29 U.S.C. §1140.

Just as the Third Circuit has recognized the broad remedial purposes of ERISA and remedies available under it, so has the Sixth Circuit in the case of *Warren v. Society Nat. Bank*, 905 F.2d 975, 980 (6th Cir. 1990), *cert. denied*, 500 U.S. 952, 111 S.Ct. 2256 (1991).

In *Warren v. Society National Bank*, the Court of Appeals held that the provision permitting participants in ERISA plans

to obtain other appropriate equitable relief for violations of statute or terms of plan allows the recovery of monetary damages for plan trustees' breach of fiduciary duty. The Sixth Circuit held that the measure of damages to which the claimant was entitled under the ERISA Statute was the amount that would put him in the position he would have been in had the fiduciary *not* committed the breach of trust. The Court held that §502(a)(3) of ERISA, when construed with §404(a), provides for equitable remedies, including monetary damages.

The Court noted the factual differences in *Warren* and in *Massachusetts Mutual Life Insurance Co. v. Russell.* In the latter case, claim was asserted based upon §502(a)(2) rather than §502(a)(3). Moreover, the plaintiff in *Massachusetts Mutual* made no claim that the fiduciary of her disability plan violated a contractual duty. Instead, in *Massachusetts Mutual,* the plaintiff had received all the benefits to which she was entitled under the terms of the plan. In contrast, Dr. Warren brought his action pursuant to §502(a)(3) based on a cause of action under §404(a)(1). Relying on Justice Brennan's concurrence in *Massachusetts Mutual,* the Court concluded that "other appropriate equitable relief" for breach of fiduciary duties under §404(a) includes the imposition of monetary damages. *Id.* at 981. While it did not approve punitive damages, it held that the claimant did state a cause of action for the diminished value of his funds distributed in violation of his wishes, the immediate income tax consequences, and the loss over time of continued accumulation of tax-deferred retirement funds. Thus, the Sixth Circuit denied the defendant's motion to dismiss, holding that the amended complaint gave clear notice of the nature of the plaintiff's claims and their bases that were sufficient to withstand a Rule 12(b)(6) motion.

Moreover, a monetary award pursuant to §502(a)(3) can be based on equitable theories like unjust enrichment. *Provident Life & Acc. Ins. Co. v. Waller,* 906 F.2d 985, 992 (4th Cir.

1990), *cert. denied*, 498 U.S. 982, 111 S.Ct. 512 (1990). Unjust enrichment is a form of restitution developed in equity to force a party to disgorge benefits that it would be unjust for it to keep. Under the rationale of *Provident Life*, the Plaintiff should be entitled to recover not only her economic and non-economic losses but also the value of the benefits and additional money the Defendant has earned by wrongfully denying Melissa Wileman a bone marrow transplant and high dose chemotherapy.

Plaintiff believes that this position is not inconsistent with the holding of the Supreme Court in the recent case of *Mertens v. Hewitt Associates*, 113 S.Ct. 2063 (1993). The only issue that the Court decided in that case is whether the ERISA Statute authorizes suits for money damages against *non-fiduciaries* like the actuary sued in that action. The Supreme Court held that it does not. Such a Decision has no application to the instant action where a suit is brought against fiduciaries for breaches of their fiduciary duties.

The Third Circuit without comment held that ERISA's Insurance Savings Clause, 29 U.S.C. §1144(b)(2)(A) does not exempt the Pennsylvania Insurance Bad Faith Statute from preemption. The Pennsylvania Statute provides:

> "Actions on insurance policies
>
> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.

(3) Assess court costs and attorney fees against the insurer."

42 Pa.C.S. §8371.

Plaintiff believes that *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380 (1985) mandates a finding that the Pennsylvania Bad Faith insurance law is not preempted by ERISA. The issue in *Metropolitan Life* was whether an insurer selling an insurance policy to an ERISA benefit plan engages in the business of insurance. Where the law spreads a policyholder's risk, the law is an integral part of the relationship between insurer and insured, and where the practice is limited to the insurance industry, the Savings Clause applies to protect state insurance regulations from preemption.

In the case of *Stuart Circle Hosp. Corp. v. Aetna Health Management*, 995 F.2d 500 (4th Cir. 1993), *cert. denied*, U.S. , 114 S.Ct. 579 (1993), the Court looked at the effect of the Savings Clause on a Virginia Statute relating to insurance. As in this case, the Trial Court held that the ERISA preemption overrode the Savings Clause and, therefore, dismissed the action. The Fourth Circuit reversed. The Savings Clause states:

"nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance. ..."

29 U.S.C. §1144(b)(2)(A).

Relying on the Supreme Court analysis in *Metropolitan Life Ins. Co. v. Massachusetts, supra*, the Fourth Circuit noted the two-part analysis to determine if the Savings Clause was effective with regard to a state law. The first was a commonsense approach, finding that the statute at issue regulated insurance contracts and logically should be encompassed by the "which regulates insurance" language of the Savings

Clause. Second, the Court examined the phrase "business of insurance" with respect to the McCarran-Ferguson Act, 15 U.S.C. §1011, *et seq.* In the latter, Congress was concerned with the type of state regulation that centers around the contract of insurance and the "relationship between insurer and insured, the type of policy which could be issued, its reliability, its interpretation, and enforcement—these were the core of the 'business of insurance'." *Metropolitan Life, supra* at 743-44. Moreover, as the Court emphasized in *Metropolitan Life,* if the law centers on an integral part of the policy relationship between the insurer and the insured, and is limited to the insurance industry, it is not preempted.

In *Stuart Circle Hospital Corp., supra,* the Court concluded that the Virginia Statute fit within the Savings Clause. Like the statute at issue in this case, it regulated the relationship between insurer and insured. It prohibited the insurer's "imprudent" and unreasonable actions, under the Pennsylvania Statute called "bad faith." In both a technical and a commonsense view, it regulated insurance dealings.

Thus, on this basis on which the Third Circuit remained silent, Petitioner asks that the dismissal of her Complaint be reversed.

C. Where The Third Circuit Followed Neither Its Own Precedent Or The Federal Rules Of Civil Procedure In Denying Leave To Amend, Resulting In Dismissal Of This Case, The Petitioner Should Have Been Permitted To Amend The Complaint

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Melissa Wileman died on September 15, 1993. This case was filed in January, 1994. On July 13, 1994, the Trial Court dismissed the case on Defendants' Motion for Summary Judgment under Fed. R.C.P. 56. By Judgment Order of March 15,

1995, the Third Circuit affirmed, holding Plaintiff's claims preempted by ERISA and denying her leave to amend in that it was requested "too late." Slip Op. p. 2.

Amendment under Fed. R.C.P. 15(a) is to be liberally granted and denied only where there is evidence of substantial prejudice, bad faith or dilatory motives. *Lorenz v. CSX Corp.*, 1 F.3d 1406 (3d Cir. 1993). Delay alone in requesting permission to amend is insufficient to warrant denying amendment. *Adams v. Gould, Inc.*, 739 F.2d 858 (3d. Cir. 1984), *cert. denied*, 469 U.S. 1122, 105 S.Ct. 806 (1985). Amendment is allowed up through trial where justice requires. If amendment would allow the Plaintiff to go forward with her action, it should be granted. To do otherwise *is antithetical to notions of fairness. Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208 (3d Cir. 1984). This is especially true in light of the fact that the statute of limitations has not yet run on this case that has been on appeal for a year.

Moreover, our Federal Courts adhere to notice pleading. Surely, Plaintiff's Amended Complaint, consisting of twenty pages of ninety-three paragraphs, apprises the Defendants of the material facts in this matter. Further, this is the second action brought against them arising out of the same facts. Under Fed. R.C.P. 8(a)(2), a complaint has been deemed to be sufficient if it provides notice to the Defendants of the essential elements of the cause of action. *Holder v. City of Allentown*, 987 F.2d 188 (3d. Cir. 1993).

CONCLUSION

It is incongruous that the bestseller *The Rainmaker* by John Grisham deals with nearly identical facts but a private insurance policy, an understanding judge and state law. The difference in results cannot be justified nor can employees bargaining for health benefits continue to be treated differently from individuals who buy their own medical insurance directly.

Respectfully submitted,
ANGINO & ROVNER, P.C.
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Attorneys for Petitioner
**Counsel of Record*

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 94-7473

ERMA GARNER, Individually and as Administratrix of the Estate of Melissa Wileman, Deceased,

Appellant,

v.

CAPITAL BLUE CROSS; PENNSYLVANIA BLUE SHIELD

Appeal from the United States District Court for the Middle District of Pennsylvania
(D.C. Civil Action No. 94-cv-00218)
(District Judge: Hon. William W. Caldwell)

Argued on January 31, 1995

BEFORE: SCIRICA, ROTH, and SAROKIN, Circuit Court Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, that:

1. The trial court erred in holding that the ERISA Statute controlled this action; and

2. The trial court erred in granting appellees' motions for summary judgment, dismissing this action brought to seek redress for the death of Melissa Wileman because of the appellees' refusal to agree to pay the costs of an autologous bone marrow transplant until after Melissa Wileman was no longer a candidate for such a transplant. Appellant alleges that the trial court should have found that

a. appellant has a claim against appellees for breach of fiduciary duty;

b. appellant has a remedy of "appropriate equitable relief under 29 U.S.C. §1132(a)(3)(B);

c. the Pennsylvania bad faith insurance statute, 42 P.S. §8371, is exempt from ERISA preemption; and

d. appellant should have been given a further opportunity to amend her complaint.

We hold that appellant's claim is preempted by ERISA and thus we do not need to consider the state law issues raised by appellant.[1] We further find that, although appellant was informed of appellees' position that ERISA preempted her claims and although appellant was given an opportunity by the District Court to amend her complaint, she chose not to plead an ERISA claim. Her request now at the appellate level to amend her complaint to plead an ERISA cause of action comes too late.

IT IS ADJUDGED AND ORDERED that the judgment of the district court entered July 13, 1994, be and is hereby affirmed.

Costs to be taxed against appellant.

BY THE COURT,
/s/Roth
Circuit Judge

Attest:
/s/P. Douglas Sisk, Clerk

DATED: MAR 15 1995

---

[1] Because Melissa Wileman did not seek a remedy under 29 U.S.C. §1132(a) for denial of benefits due to her under the terms of her ERISA plan, we also do not have to, under the circumstances of this case, consider the issue, which was alluded to by appellant that monetary damages should be available under ERISA on a claim that the insurance carrier for an ERISA medical or hospital plan wrongfully failed to pay benefits which were due to a beneficiary under the terms of that plan.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 94-7473

ERMA GARNER, Individually and as Administratrix of the Estate of Melissa Wileman, Deceased,

Appellant,

v.

CAPITAL BLUE CROSS; PENNSYLVANIA BLUE SHIELD

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, Circuit Judges

SUR PETITION FOR REHEARING IN BANC

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participatede* in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

BY THE COURT,
/s/Roth
Circuit Judge

DATED: MAY 08 1995

Erma GARNER, Individually and as Administratrix of the Estate of Melissa Wileman, Deceased, Plaintiff,

v.

CAPITAL BLUE CROSS and Pennsylvania Blue Shield, Defendants.

Civ. A. No. 1:CV-94-0218.

United States District Court,

M.D. Pennsylvania.

July 13, 1994.

Employee welfare benefit plan participant's mother brought action, individually and as administratrix of participant's estate, against health insurers in state court arising out of denial of benefits. Action was removed. Insurers moved for summary judgment. The District Court, Caldwell, J., held that: (1) ERISA preempted claims for negligence, negligent or intentional infliction of emotional distress, bad faith denial of claim, fraud, violation of covenants of good faith and fair dealing, wrongful death, and survival, and (2) count alleging that insurers breached contracts of insurance would not be construed as an ERISA claim.

Motions granted.

1. Pensions 22
States 18.51

Count of amended complaint alleging that health insurers acted negligently with respect to insured under employee welfare benefit plan asserted state law claim of negligence which was preempted by ERISA. Employee Retirement Income Security Act of 1974, §514, as amended, 29 U.S.C.A. §1144.

2. Damages 49.10, 50.10
Pensions 22
States 18.15, 18.51

State law causes of action against health insurers for negligent and intentional infliction of emotional distress were preempted by ERISA. Employee Retirement Income Security Act of 1974, §514, as amended, 29 U.S.C.A. §1144.

3. Damages 49.10
Pensions 22
States 18.15, 18.51

Fact that a party other than employee welfare benefit plan participant claimed emotional distress did not preserve claim from preemption by ERISA as actions of which participant complained were denial of benefits and, thus, the claim related to ERISA plan. Employee Retirement Income Security Act of 1974, §514, as amended, 29 U.S.C.A. §1144.

4. Pensions 22

State law claim that health insurers denied employee welfare benefit plan participant's claim in bad faith was preempted by ERISA. Employee Retirement Income Security Act of 1974, §514, as amended, 29 U.S.C.A. §1144; 42 Pa.C.S.A. §8371.

5. Pensions 22
States 18.15, 18.51

State law fraud cause of action against health insurers under employee welfare benefit plan was preempted by ERISA. Employee Retirement Income Security Act of 1974, §514, as amended, 29 U.S.C.A. §1144; 42 Pa.C.S.A. §8371.

6. Pensions 22
States 18.51

ERISA preempted state law claims against health insurers under employee welfare benefit plan for alleged violations

of covenants of good faith and fair dealing and wrongful death. Employee Retirement Income Security Act of 1974, §514, as amended, 29 U.S.C.A. §1144.

7. Pensions 22
States 18.15

State survival action against health insurers arose out of insurers' decision regarding employee welfare benefit plan participant's claim; thus, it related to ERISA plan and was preempted by ERISA. Employee Retirement Income Security Act of 1974, §514, as amended, 29 U.S.C.A. §1144.

8. Pensions 22
States 18.51

ERISA preempts state actions for breach of contract. Employee Retirement Income Security Act of 1974, §514, as amended, 29 U.S.C.A. §1144.

9. Pensions 139

To the extent that employee benefit plan participant's mother and administratrix of participant's estate sought to have district court construe her claim against health insurers for breach of contracts of insurance as an ERISA action, district court declined to do so; ERISA was an equitable statute but claim sought money damages, because mother did not actually incur medical expenses, restitution would have been appropriate, and because plan participant did not survive, any request for injunction would have been moot. Employee Retirement Income Security Act of 1974, §§2 et seq., 502, as amended, 29 U.S.C.A. §§1001 et seq., 1132.

Pamela Green Shuman, Angino & Rovner, P.C., Harrisburg, PA, for plaintiffs.

James J. Kutz, Eckert, Seamans, Cherin & Mellott, Douglas J. Davison, Harrisburg, PA, for defendant Capital Blue Cross.

Randall Glenn Gale, Thomas, Thomas & Hafer, Harrisburg, PA, for defendant Pennsylvania Blue Shield.

MEMORANDUM

CALDWELL, District Judge.

We are considering the motions for summary judgment filed by Defendants, Capital Blue Cross ("Blue Cross") and Pennsylvania Blue Shield ("Blue Shield"). We exercise jurisdiction according to 28 U.S.C. §§1331 and 1332.

I. *Facts and Procedural History*

This case arises from the death of Melissa Wileman, a young woman who was diagnosed in June, 1992, with peripheral neuroectodermal cancer.[1] Physicians placed Ms. Wileman on chemotherapy and the treatment decreased the size of her tumor by nearly 70 per cent. Her physicians suggested that her only remaining opportunity to entirely eliminate the cancer was to undergo a bone-marrow transplant.

Ms. Wileman was employed by Lyon Fashions, Inc. ("Lyon"), a clothing manufacturer based in Pennsylvania. Defendant Capital Blue Cross provided benefits to Lyon employees. *See* Plan, Exh. A to the Amended Complaint. Capital Blue Cross initially declined to precertify the procedure, determining that it was experimental and, therefore, not covered by the Lyon policy. After receiving communication from the Pennsylvania Insurance Department and Ms. Wileman's counsel, Blue Cross reconsidered its earlier position and indicated to Ms. Wileman's counsel that it would pay for the treatment. It asserted that its decision was based on an exception in the plan and that it continued to believe its earlier refusal was correct. *See* Letter of 6/18/93 from Mary Jane Forbes to Pamela G. Shuman, Esq. However, while preparing for the bone-marrow transplant in June, 1993, doctors determined that Ms. Wile-

1. We draw our description of the facts from the complaint.

man was too weak to undergo the procedure. Ms. Wileman died on September 15, 1993.

On January 21, 1994, Plaintiff Erma Garner, individually as Ms. Wileman's mother and as administratrix of her daughter's estate, filed a complaint in the Court of Common Pleas of Dauphin County, Pennsylvania. She alleged causes of action against Blue Cross and Blue Shield. By notice of February 14, 1994, Defendants removed the case, asserting that it falls within the ambit of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.* Plaintiff moved to remand and Defendants moved to dismiss and we denied the motions in our Memorandum and Order of April 15, 1994. We also permitted Plaintiff the opportunity to amend her complaint so that it might more clearly set forth her causes of action. Plaintiff filed an amended complaint on April 29, 1994, and both Defendants have moved for summary judgment, asserting that the causes of action plead• by the amended complaint are preempted by ERISA.

II. *Law and Discussion*

A. *The Amended Complaint*

In our Memorandum and Order of April 15, 1994, we suggested that Plaintiff amend her complaint to "more clearly indicate which causes of action she is pursuing." As Blue Cross notes in its brief, the amended complaint is plead in the same manner as the original complaint and we agree with Defendants that the amended complaint is confusing. It sets out eight "counts" and four "claims." The "counts" only obliquely indicate the asserted causes of action while the "claims" are labeled "wrongful death," "survival action," "bad faith," and "emotional distress." We are unfamiliar with this pleading technique and share Defendants' concerns. In defending against a complaint, a defendant must be able to readily determine what is alleged. Here, Defendants (and the Court)

are left to guess what Plaintiff intends to assert, particularly because several of the "counts" and "claims" appear to be duplicative. For example, Count III avers

> 50. The Defendants are responsible for the negligent and/or intentional infliction of emotional distress suffered by both Melissa Wileman and Erma Garner based upon their contemporary sensory perceptions of the Defendants' negligent denial and/or delay in granting pre-authorization for Melissa Wileman's bone marrow transplant.

Claim IV avers

> 93. Based upon the negligent and/or intentional infliction of emotional distress, Plaintiffs are entitled to compensation from the Defendants for the emotional distress suffered plus punitive damages, attorney's fees and costs.

These assertions appear to be redundant, as are Count IV and Claim III (bad faith) and Count II and Count VII (negligence).[2]

A complaint which is prolix or confusing makes it difficult for a defendant to fairly defend and it unnecessarily erects hurdles to an orderly and efficient disposition of the case. *See Vicom Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 776 (7th Cir.1994). Indeed, some courts have dismissed such complaints for failure to comply with Fed.R.Civ.P. 8(a) and (e). *See Alfano v. Whitmore*, No. 79 C 5394 (N.D. Ill. April 29, 1980). We are not inclined to take such this* action, although we must conclude that Plaintiff did not heed the message in our Memorandum and Order of April 15,1994. We will con-

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[2] Counts VII and VIII seem to allege some variations of negligent or intentional infliction of emotional distress. Count VII could be construed to assert a negligence claim.

sider the motions for summary judgment and revisit the pleading issue if necessary.

B. *The Motions for Summary Judgment*

Summary judgment is appropriate when there remain no genuine issues as to any material facts and judgment may be entered as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). When a movant submits that there is no genuine issue as to a material fact, its opponent must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd., et al. v. Zenith Radio Corp. et al.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Defendants argue that the employee-benefit plan offered by Ms. Wileman's employer, Lyon Fashion, Inc., is governed by ERISA. With the exception of her previously filed motion to remand, Plaintiff does not deny that conclusion. *See* 29 U.S.C. §1003(a)(1).

1. *Preemption*

The crux of the current motions is Defendants' argument that all of the allegations of the amended complaint recite state-law causes of action that are preempted by ERISA. *See* 29 U.S.C. §1144(a).

In enacting ERISA, Congress included a broad preemption of state law claims:

> **(a) Supersedure; effective date**
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and

not exempt under section 1003(b) of this title. This section shall take effect January 1, 1975.

(b) Construction and application

•••

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

•••

(B) Neither an employee benefit plan described in section 1003(a) of this title ... nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer ... for purposes of any law of any State purporting to regulate insurance companies ...

29 U.S.C. §1144. A number of United States Supreme Court decisions have construed the ERISA preemption clause. The Court has held that the enforcement provisions of ERISA are sufficiently broad to indicate a congressional intent that almost all state-law claims be preempted. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Section 1144(b)(2)(A), known as the "saver" clause, works to allow certain state insurance laws to survive the ERISA preemption. *Metropolitan Life Insur. Co. v. Massachusetts*, 471 U.S. 724, 732, 105 S.Ct. 2380, 2385, 85 L.Ed.2d 728 (1985). However, the exception provided by the "saver" clause is itself limited by §1144(b)(2)(B), which is known as the "deemer" clause because it deems certain benefit plans not to be insurance plans subject to state regulation and, therefore, not "saved" from ERISA preemption. The Court recently delineated which benefit plans qualify for the "deemer" clause exemption. *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990). The Court held that the deemer

clause exempts self-funded ERISA plans from state laws regulating insurance. *Id.*, 498 U.S. at 60, 111 S.Ct. at 409, 112 L.Ed.2d at 366. The Supreme Court has also held that other state-law or common-law claims are preempted by ERISA. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987).

2. *Count II*

[1] Count II of the amended complaint asserts that

> 43. Defendants Capital Blue Cross and Pennsylvania Blue Shield acted negligently with respect to Melissa Wileman by ...

We construe this to assert a claim of negligence. As such, we find that it is preempted by 29 U.S.C. §1144 and we will grant judgment on that count.[3]

3. *Counts III, VII, and VIII, and Claim IV*

[2,3] Counts III, VII, and VIII and Claim IV appear to assert causes of action for negligent or intentional infliction of emotional distress. These claims as well are preempted. *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3d Cir.1989).[4]

4. *Count IV and Claim III*

[4] Count IV and Claim III assert that Defendants denied Ms. Wileman's claim in bad faith. *See* 42 Pa.Cons.Stat. §8371. While the United States Court of Appeals for the Third Circuit has not addressed the issue of whether ERISA preempts such

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3. Although we will discuss Count VII later in this Memorandum, we note that, to the extent that it makes a negligence claim, it is preempted.

4. These allegations also assert that Ms. Wileman's mother suffered severe emotional distress. The fact that a party other than the plan participant claims emotional distress does not preserve the claims from preemption. *See Kuhl v. Lincoln Natiotial Health Plan*, 999 F.2d 298, 303-04 (8th Cir.1993). The actions of which she complains were the denial of benefits and, thus, the claim "relates to" an ERISA plan. *Id.* Put another way, Mrs. Garner's emotional distress would stem from the claim denial.

a claim, we agree with the numerous district courts that have found such claims preempted. *See Rallis v. Trans World Music Corp.*, No. 93-6100, 1994 WL 96264 at *4 (E.D.Pa. March 25, 1994) (collecting cases). Thus, we find Count IV and Claim III preempted.

5. *Count V*

[5] Count V asserts a cause of action for fraud. Again, such a common-law claim is preempted. *See Elmore v. Cone Mills Corp., et al.*, 23 F.3d 855 (4th Cir.1994); *Glasgow v. Ken J. Pezrow Corp., et al.*, No. 91-1528, 1991 WL 209799 at *1, 1991 U.S.Dist. LEXIS 14643 at *2 (E.D.Pa. Oct. 9, 1991).

6. *Count VI*

[6] Count VI alleges that Defendants violated their covenants of good faith and fair dealing by denying Ms. Wileman's claim. Such claims are preempted by ERISA. *Pane*, 868 F.2d at 635.

7. *Claim I*

Claim I asserts a cause of action for wrongful death. ERISA preempts wrongful death claims. *See Kolb v. Livengrin Foundation, Inc.*, No. 92-01703, 1992 WL 333592 at *5 (E.D.Pa. Nov. 9, 1992).

8. *Claim II*

[7] Claim II is a survival action brought on behalf of the estate of Ms. Wileman according to 42 Pa.Cons.Stat.Ann. §8302. As with the other common-law or state-law claims, any cause of action here would arise from Defendants' decision regarding Ms. Wileman's claim. Thus, it relates to an ERISA plan and is preempted by the federal statute. *See Dukes v. United States Health Care Systems of Pennsylvania, Inc.*, 848 F.Supp. 39, 41 (E.D.Pa. 1994). We will dismiss Claim II.

9. *Count I*

We have reserved our examination of Count I until we considered the other parts of the complaint. Count I is the heart of this complaint and it is, in some ways, the most troubling.

[8,9] Count I clearly contains language sounding in contract law.

> 40. Defendants Capital Blue Cross and Pennsylvania Blue Shield breached their contracts of insurance with Melissa Wileman by ...

ERISA preempts actions for breach of contract. *Pilot Life*, 481 U.S. at 45, 107 S.Ct. at 1552; *see also, Booz v. Unum Life Insurance Co.*, No. 93-2326, 1993 WL 313372 at *1 (E.D.Pa. July 29, 1993). We are reluctant, however, to assume that Plaintiff means to assert a common-law breach of contract claim rather than an ERISA claim under 29 U.S.C. §1132.[5]

In reviewing a motion such as this, we are to view the complaint in the light most favorable to the plaintiff. Here, Plaintiff avers that

> [Defendants breached the contract of insurance by] ... acting in an arbitrary and capricious manner in denying and/or delaying pre-authorization for Melissa Wileman's bone marrow transplant ...

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5. Plaintiff argues at length about the merits of the case; *i.e.*, whether the procedure requested was, actually, experimental. That issue is not now before the Court. A preemption argument does not implicate the substance of a claim. Further, it is not clear why, at this stage of the litigation, Plaintiff cites *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993). *Bixler* dealt with the availability of certain causes of action within ERISA. Here, Plaintiff contends that Ms. Wileman was due certain benefits of the insurance plan. Such an action is certainly recognized within ERISA. *See* 29 U.S.C. §1332. The question here is whether Plaintiff has plead* a common-law breach-of-contract claim (which would be preempted) or a proper ERISA claim.

Amended Complaint at ¶ 40. A district court should approach an ERISA case bearing in mind the broad purposes of ERISA. *Bixler, supra.* Nevertheless, we must agree with Defendants that Plaintiff has failed to properly plead an ERISA case.

ERISA is, in large measure, an equitable statute. *Mertens v. Hewitt Associates,* U.S. , 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). As such, its civil remedies provisions contemplates equitable actions such as injunctions, restitution, and mandamus. U.S. at - , 113 S.Ct. at 2064-66, 124 L.Ed.2d at 165-66. Those provisions do not provide for awards of money damages. *Id.* Importantly, Plaintiff's claim, sounding as it does in contract law, seeks damages. Because Plaintiff did not actually incur medical expenses, restitution would be inappropriate and, because Ms. Wileman did not survive, any request for an injunction would be moot.[6]

To the extent that Plaintiff seeks to have the court construe her claim as an ERISA action, we decline. Plaintiff has neither sought, nor been granted, leave to amend her complaint. Fed.R.Civ.P. 15. She has, however, already had the opportunity to amend her complaint to plead an ERISA case in this court and has not done so. To either construe her claim as an ERISA claim or to allow her to amend at this late date would prejudice the Defendants. Further, as noted, ERISA does not contemplate an action such as that brought here. Thus, any amendment would be subject to a motion to dismiss. *Unger v. Nat'l Residence Matching Program,* 928 F.2d 1392 (3d Cir. 1991).

Given these two conclusions, we will grant summary judgment as well on Count I.

We will issue an appropriate order.

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[6] We are not unaware that medical providers often decline to render expensive treatment unless it is guaranteed by an insurer. The injunctive relief available under ERISA was almost certainly, in part, intended to address that situation.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ERMA GARNER, Individually and as Administratrix of the Estate of Melissa Wileman, Deceased,

Plaintiff

vs.

CAPITAL BLUE CROSS and PENNSYLVANIA BLUE SHIELD, Defendants

CIVIL ACTION NO. 1:CV-94-0218

ORDER AND JUDGMENT

AND NOW, this 13th day of July, 1994, upon consideration of Defendants' motions for summary judgment, it is ordered that:

1. The motions are granted.

2. Judgment is entered in favor of Defendants and against Plaintiff.

3. The Clerk of Court shall close this file.

/s/William W. Caldwell
United States District Judge

§1001. Congressional findings and declaration of policy

***

(b) Protection of Interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

***

§1001b. Additional Congressional findings and declaration of policy; single-employer plan termination insurance system

(a) Findings

The Congress finds that—

(1) single-employer defined benefit pension plans have a substantial impact on interstate commerce and are affected with a national interest;

(2) the continued well-being and retirement income security of millions of workers, retirees, and their dependents are directly affected by such plans;

(3) the existence of a sound termination insurance system is fundamental to the retirement income security of participants and beneficiaries of such plans; and

(4) the current termination insurance system in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers.

(b) Additional findings

The Congress further finds that modification of the current termination insurance system and an increase in the insurance premium for single-employer defined benefit pension plans—

(1) is desirable to increase the likelihood that full benefits will be paid to participants and beneficiaries of such plans;

(2) is desirable to provide for the transfer of liabilities to the termination insurance system only in cases of severe hardship;

(3) is necessary to maintain the premium costs of such system at a reasonable level; and

(4) is necessary to finance properly current funding deficiencies and future obligations of the single-employer pension plan termination insurance system.

***

§1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1003(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

***

§1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

***

§1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respct[1] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such

[1] So in original. Probably should be "respect".

request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena,* or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan of an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and

process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a

transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(Pub.L. 93—406. Title I, §502, Sept. 2, 1974, 88 Stat. 891; Pub.L. 96—364, Title III, §306(b), Sept. 26, 1980, 94 Stat. 1295.)

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§1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. §301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan,

this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

(Pub.L. 93—406, Title I, §510, Sept. 2, 1974, 88 Stat. 895.)

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§1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance

company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except

such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be suffi-

cient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

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*Errata in original.